

## **Probable Cause in A Nervous Age**

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### *I. Introduction*

It is time to re-visit an old friend. Our age is uncertain, our anxieties profound, and our air still defiled by the stench of fear acts of mass terrorism have left like toxic clouds that refuse to dissipate. Those acts of terrorism have raised old doubts (and given birth to new ones) about whether the laudatory principles we espouse in our public documents are, to some degree, the prescription for our own undoing.

Among those principles are ones that speak directly to guarding our personal privacy. With fear in the air, we are tempted to barter those principles by granting greater power to the government in exchange for greater collective security. We contemplate this knowing all the while that this is a zero sum game in which security is purchased in the currency of personal freedom.

In this contemplation, we need to revisit our old friend probable cause. We need wonder whatever became of it and whether it can have meaning in such a nervous age.

At first glance, of course, probable cause seems like not so much a friend as a potential villain, limiting the government's ability to probe into suspected criminal activity and thwart a new terrorist offensive. We sense pressure to read it and other provisions of the Fourth Amendment as if they were penned in disappearing ink or contained a footnote that allowed for their suspension at the discretion of those elected to do the thwarting. But something holds us

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back. This is not just any friend we would dismiss, after all, but an old friend. We are not quite certain that by paying the price in the zero sum game to indulge our fear we would not be risking the loss of something we cannot afford to lose.

This article explores the reason behind the instinct that holds us back. It is an effort to determine if there is a core to our sense of justice that concepts like probable cause help to make a reality; a core that, as we struggle to deal with the political fallout of a nervous age, should be left alone.

It is an open letter to judges, the administrators of probable cause, giving advice on the care and handling of a device born in antiquity but perpetually relevant. It is a warning of what might happen if it slips through their hands. It proposes what seems like a paradoxical solution: for probable cause to be understood more simply by all of us (and implemented more practically by judges), we ought to use the complex political theories of John Rawls as a guide.

In the final analysis, this simple text submits that a re-visiting of probable cause is a search to find the core of our sense of justice, and the best processes we can use to bring about its closest approximation. The process, it turns out, involves listening carefully to the most powerful force in the political universe – the reasoned voice of the governed.

We will proceed simply. First, we will note some of the criticisms of probable cause after September 11<sup>th</sup> and observe that such criticisms are nothing new. Next, we will remind ourselves of the importance of probable cause within American constitutional jurisprudence. Then we will recount the frustrating path a judge or student would take to understanding this important concept simply by trying to discern its meaning by reference to precedent, nomenclature, mathematics, or history. Finally, we will place probable cause in the realm of political science and see how the light of that world illuminates it.

## II. Blaming Probable Cause

Thoughtful scholars writing in the wake of September 11<sup>th</sup> have questioned whether our understanding of the Fourth Amendment contributed to our vulnerability and have argued that our perceptions of that amendment must change to enable the government to interdict future acts of mass murder.<sup>2</sup>

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2. Professor Etzioni has written a comprehensive analysis of the phenomenon of societal attitudes after September 11<sup>th</sup> regarding governmental powers of search and seizure in his book. AMITAI ETZIONI, *HOW PATRIOTIC IS THE PATRIOT ACT? FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM* (Routledge 2004). In his book, Professor Etzioni argues that “trade-offs” between security and implementation of the Bill of Rights are a necessity. *Id.* at 1-3. He posits that we can and should “refashion” our conception of these rights in the face of the need to prevent such future attacks. *Id.* at 5. Such a refashioning, he argues, is necessary to prevent the Republic from following the Weimar Republic into the pages of obscurity as he contends that it was “inaction in the face of threats, not excessive action” that caused the Weimar Republic to fail to preserve its institutions and be swallowed up by a totalitarian regimen. *Id.* at 5-14. While investigative tools such as large scale interviewing of groups of individuals “are not measures the United States would have taken in normal times,” they represent “a price we must pay for our enhanced security.” *Id.* at 33-34.

Other scholars have similarly argued for the expansion of police powers in the wake of the attacks. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002). Professor Lerner has identified a specific instance of concern raised by various Justice Department officials regarding an interpretation of probable cause adopted by the Minneapolis Office of the United States Attorney prior to September 11<sup>th</sup> that arguably limited a search otherwise to be conducted of Zacarias Moussaoui. Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 952-53 (2003).

The events of September 11<sup>th</sup> evidently had an impact on the academic community as well. In the October, 2001 issue of the Michigan Law Review, Professor Thomas published a most thoughtful and fascinating analysis of the Fourth Amendment, arguing, *inter alia*, that the Fourth Amendment was, and should vigorously but primarily be interpreted to mean, a substantial limitation on the powers of the federal government.

The principle concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime. An expansive protection against prosecution means, of course, that guilty as well as innocent people go free, but the Framers expressed no concern about this effect of the Bill of Rights. The anti-Federalists simply distrusted prosecutors who would advance the federal government’s interests and federal judges who might be corrupt or biased against those who did not pay proper obeisance to the federal government.

George C. Thomas III, *When Constitutional Words Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 159-60 (2001). He argues that “the Framers were not concerned with the government’s interests in solving crime,” and that while today we “fear criminals, the Framers feared the central government.” *Id.* at 173.

Clearly, however, the difference in what we fear today from what the Framers feared, and the intensity of our fear, is markedly different in the aftermath of September 11<sup>th</sup>. Professor Thomas acknowledges this; indeed he says “the world is different in 2001.” He advises that another paper would be necessary to resolve the implications of his thesis that future Fourth Amendment analysis should return to a vigorous requirement of warrants for the federal government, but a lesser procedural demand with respect to the states when the Fourth Amendment is incorporated against them through the Fourteenth. *Id.* at 174.

Dissatisfaction with existing interpretations of the Fourth Amendment is not, however, a phenomenon that began on the afternoon of September 11, 2001. Contrast the following quotations from scholarly articles published before and after the attacks.

In his 2003 piece, *The Reasonableness of Probable Cause*, Professor Lerner begins his conclusion with the following:

In the aftermath of September 11, several commentators mused that the Constitution would handicap our nation's efforts to combat terrorism. One observer wondered whether the Bill of Rights was so hopelessly out of touch with the reality and gravity of the threat to our nation that unless we "abandon key constitutional protections . . . deaths from terrorism [will number in the millions]." This Article takes as its starting point the following principle: Any interpretation that renders the Constitution a suicide pact is almost surely an erroneous interpretation.<sup>3</sup>

Seventeen years before the fall of the twin towers, Professor Grano observed the following in his article, *Probable Cause and Common Sense: A Reply to Critics of Illinois v. Gates*:<sup>4</sup>

This article has addressed the evidentiary burden that the government must carry before such an intrusion should be permitted. I have argued that the government's burden should not be defined at so high a level that it impedes legitimate law enforcement interests. We need not interpret the Fourth Amendment's probable cause requirement to leave us so secure against encroachments by government that we are left insecure against predatory behavior by our fellow citizens, behavior that also may destroy our liberty, our pursuit of happiness, and sometimes our very lives. I have attempted to demonstrate that neither history nor common sense compels such a restrictive view of the probable cause requirement.<sup>5</sup>

Blaming probable cause is, of course, to blame the Framers of the Amendment who cast the term in constitutional stone in the first place. Did they truly force our brave and dedicated

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3. Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1028 (2003) (internal citations omitted).

4. Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 MICH. J.L. REFORM 465 (1984).

5. Grano, *supra* note 4, at 520. See also Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983) (internal citations omitted).

law enforcement officials to adhere to the Marquis of Queensbury rules while letting the other fighter use knives and attack after the bell? Or did the Framers grant power commensurate with the threat, making such current criticism merely a situation of a laborer blaming his tools for a shoddy piece of construction, or more to the point, investigation?

A rejoinder to criticisms that the Bill of Rights constitutes the “whereas clauses” of a suicide pact, is as old as the criticisms themselves. Consider the eloquent passages of *Ex Parte Milligan*.<sup>6</sup> There, Lambdin Milligan was spared the hangman’s noose by the Supreme Court’s grant of a Writ of Habeas Corpus vacating his conviction for treason during the Civil War. He was tried summarily, denied the protections of a grand jury indictment and a trial by jury.<sup>7</sup> In response to the government argument that the desperate events of the Civil War justified a relaxation of basic constitutional principles, the Court admonished:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the *theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence*; as has been happily proved by the result of the great effort to throw off its just authority.<sup>8</sup>

But, of course, that was a war in which the greatest weapon of mass destruction was probably canister fire and the enemy was usually sporting enough to present themselves in matching uniforms for ready identification on a defined battlefield. May we still say today that the noble 18<sup>th</sup> century language of the Constitution gives our collective entity all the power we need to

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6. 71 U.S. 2 (1866).

7. *Milligan*, 71 U.S. at 108.

8. *Id.* at 120-22 (emphasis added).

survive? Indeed, what was it that made the *Milligan* Court so sure that was true in the first place? Can the Fourth Amendment still stand even if the twin towers have fallen? Why is probable cause, the heartland concept of the Amendment, so important anyway?

### *III. The Importance of Probable Cause*

#### *a. As a Protection of a Specific Right*

Understanding the nature of probable cause is a critical venture. Its place is seen in the context of the right to which it relates. That right was identified most poetically by Justice Brandeis in his dissent in *Olmstead v. United States*<sup>9</sup> as follows:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans and their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.<sup>10</sup>

According to no less an authority than Professor LaFave, this “right most valued” is protected at its core by the concept of probable cause.<sup>11</sup>

Indeed, the probable cause component of the Fourth Amendment constitutes a doctrine far more important to its meaning than does its so-called “warrant requirement.” Scholars have often argued that the history of the Amendment shows the “warrant requirement” was not something ever truly required and, given that exceptions to the “requirement” are now so numerous, it is a requirement in name only.<sup>12</sup> If a nervous age seeks to water down the

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9. 277 U.S. 438 (1928).

10. *Olmstead*, 277 U.S. at 478-79.

11. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (3d ed.).

12. Professor Lerner has called the warrant requirement one of two “presumptions” about the Fourth Amendment that turn out to be “fictitious.” In discussing the warrant requirement, he points out that it is a “requirement” that has as many as twenty or more exceptions, leaving it a requirement honored essentially in breach.

Amendment's protections in the name of security, not much more dilution to the "warrant requirement" is possible. The target will be probable cause. The casualty will be the right to be let alone.

One way to dilute probable cause is to act as if it has disappeared. On January 19, 2006, the United States Attorney General published a 41-page, single-spaced defense of the asserted power of the President to tap phones of persons "reasonably believed to be linked to al Qaeda."<sup>13</sup> The thesis of this remarkable document is that without any explicit Congressional authority such as the Foreign Intelligence Security Act [FISA Act],<sup>14</sup> and solely under the auspices of Article II of the Constitution, the President may order electronic surveillance of international calls of persons (including United States citizens) without a warrant, without probable cause, and with the Department of Justice and the National Security Agency designated as the only agencies reviewing these actions "to ensure that civil liberties are being protected."<sup>15</sup>

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Lerner, *supra* note 3, at 954-55. As a side note, Professor Lerner's second "fictitious presumption" is that probable cause is necessary for a constitutional search. His argument here strikes me as somewhat less convincing. Examples of non-probable cause searches are either the administrative type searches at airports and DUI check points or the *Terry*-type street encounter. *Id.* Professor Lerner is certainly correct that large numbers of citizens are subject to these sorts of searches and that they do not require probable cause. Nonetheless, the sort of searches that by their intensity and intrusiveness most significantly challenge Justice Brandeis' right to be let alone are those in which probable cause remains a requirement.

Professors Sklansky and Amar have also written that the warrant requirement is not only excepted into virtual obscurity today, but does not have the sort of historical mandate we once might have believed. Both argue that authorities in the 18th and 19th centuries simply did not view the warrant requirement as the more modern day Court has done. See Akhill Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1763 (2000). Professor Amar tells us bluntly that:

the Amendment's Warrant Clause does not require, presuppose, or even encourage warrants – it *limits* them. Unless warrants meet certain strict standards, they are per se unreasonable. The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the imperial payroll and had the purpose and effect of precluding any common law trespass suit the agreed target party might try to bring before a local jury after the search or seizure occurred.

Amar, *supra*, at 771-72 (emphasis in original). Warrants, he concludes "were friends of the searcher, not the searched." See also Sklansky, *supra* at 774, 782.

13. U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, [DOJ Report] (January 19, 2006), at p. 1.

14. 50 U.S.C. §§1803, et. seq.

15. DOJ Report, at p. 5.

The term “probable cause” is mentioned in this document only six times. Once, it appears when the Fourth Amendment is quoted.<sup>16</sup> Another is when the FISA Act is quoted.<sup>17</sup> The four remaining references are all on one page. They are in citations to cases dealing with drug testing of high school students and an exigent circumstance where a man was made to wait outside his trailer while the police, who had probable cause to do so, got a warrant to search it.<sup>18</sup>

Were this document to be the only legal treatise on the Fourth Amendment to survive a cosmic cataclysm, future generations would believe that the Amendment’s use of the terms “warrant” and “probable cause” were surplusage. The “touchstone” for evaluating the government’s justified intrusions of privacy, the text asserts, is simply “reasonableness,” “assessed under a general balancing approach” in which the government’s interest in defending the Nation from al Qaeda, quite obviously, wins the balance.<sup>19</sup>

But probable cause is not surplusage. No reading faithful to the text of the Amendment can ignore it. It means something very important about the core values this Nation that we protect from al Qaeda holds most dear. It is a concept that the Constitution entrusts not to the same department of government doing the invasion of privacy, but to the Courts. It is an entrusting that, like all examples of separation of powers, is meant to protect liberty through the structural integrity of our system as well as by specific reference to a protected right.

#### b. As a Structural Protection of Liberty Generally

To truly understand the structural nature and importance of probable cause, I submit that we must know it by recognizing what it does when we deem that it exists. A finding of probable cause is an authorization by our society for police to invade the privacy of an individual, to

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16. DOJ Report, at p.36.

17. DOJ Report, at p.18.

18. DOJ Report, p. 37, citing *Board of Education v. Earles*, 536 U.S. 822 (2002); *Veronia School District v. Acton*, 515 U.S. 646 (1995); and *Illinois v. McArthur*, 531 U.S. 326 (2001).

19. DOJ Report, at p.37.



violate that right to be let alone. It is important both as an endpoint and a process to get to that endpoint. If we hold privacy in high regard, we will demand a heightened sense of certainty for the finding of probable cause since we know that the feeling of probable cause, once acquired, alters the relation between the citizen and their government in a most profound way. It is a process that does not leave to one branch the sole task of determining when that endpoint is reached.

Probable cause is thus like a celestial body that we cannot see, but can sense because of its gravitational pull on other objects around it. The process by which it is found, or found not to exist, defines the sphere in which the executive may operate, and requires that the executive justify an expansion of this sphere by proof judged objectively reasonable by a co-equal branch. It is no more a tangible thing than separation of powers or federalism but it operates in much the same way to frustrate the tendency of government toward tyranny by reducing the occasions in which arbitrary power may be wielded.<sup>20</sup> In this sense, it may not ultimately address any one right specifically, but operate to protect all of liberty generally.

A number of scholars have identified this critical aspect of the Fourth Amendment. While we will see that the Amendment's history fails us in certain respects, here it is reliable. The Amendment was meant to curtail the capricious search powers exercised under general warrants and writs of assistance, devices so offensive to a populous determined not to live under an arbitrary government that, by its arbitrariness, was properly accused of tyranny.<sup>21</sup>

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20. I have, at great length, sought to demonstrate that separation of powers and federalism are the two structural pillars of personal liberty. See Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599 (2005).

21. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court should Leave Fourth Amendment History Unabridged*, 82 B.U.L. REV. 895, 941-43, 966-77 (2002); Sklansky, *supra* note 12, at 1763, 1813-14; Amar, *supra* note 12, at 771-72; DAVID RUDOVSKY, SEARCHES AND SEIZURES: ARTICLE I, SECTION 8, 300-01; *Boyd*, 116 U.S. at 624-25, 630.

In *Boyd v. United States*,<sup>22</sup> the Supreme Court spoke of the fear of the invasion of personal security, liberty, and property that the Fourth Amendment was designed to protect.<sup>23</sup> The Fourth Amendment addressed the evil of the exercise of arbitrary power through discretionary searches undertaken by federal officials; interpreting the Amendment was an ongoing effort to engage in a struggle against such unchecked power.<sup>24</sup> In *United States v. Henry*,<sup>25</sup> the Court again observed that the probable cause requirement was meant to combat the pernicious general warrant and limit arbitrary action by the government in all respects.<sup>26</sup> And, of course, in *Olmstead v. United States*,<sup>27</sup> Justice Brandeis reminded us of the need to recognize that the Fourth Amendment protects a right to be let alone, a right of infinite variety and one most particularly reflecting a structural disposition that the government is to do those specific things it has been delegated to do, and otherwise leave us alone.<sup>28</sup>

Focusing on whether probable cause (and the Amendment generally) necessarily bans a specific kind of search may miss the larger point. At a deeper level, the process of probable cause may act as an overall admonition to the government that its powers are limited and defined not simply by the type of things it is empowered to do, but in how it is permitted to do them, with structures in place at the constitutional level ready to enforce those limits.

The importance of structural limits was recognized from the outset. For example, in *Federalist No. 84*, Hamilton confronted the argument made against the Constitution that it was

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22. 116 U.S. 616, 624-25 (1886).

23. *Boyd*, 116 U.S. at 630.

24. *Id.*

25. 361 U.S. 98 (1959).

26. *Henry*, 361 U.S. at 100.

27. 277 U.S. 438 (1928).

28. *Olmstead*, 277 U.S. at 478-79. An outstanding review of these cases and the underlying themes of privacy they reflect may be found in Professor Gormley's article, *100 Years of Privacy*, 5 WISC. L. REV. 1335, 1357-74 (1992).

deficient in failing to contain a Bill of Rights.<sup>29</sup> He dismissed the notion that because declarations of specific rights appeared in documents like Magna Carta, one must appear in our Constitution.<sup>30</sup> Our Constitution was written against a different, and new, set of assumptions. The older declarations, he said, were “stipulations between kings and their subjects” and as such, “they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants.”<sup>31</sup> Strictly speaking, under our Constitution, “the people surrender nothing; and as they retain everything they have no need of particular reservations.”<sup>32</sup>

Given this premise, a Bill of Rights is “not only unnecessary . . . but would even be dangerous” as it “would contain various exceptions to powers which are not granted” and would, therefore, “afford a colorable pretext to claim more than they were granted.”<sup>33</sup> The “plan of the convention,” the plan of government, is itself a bill of rights, he argued, since it serves “to declare and specify the political privileges of the citizens in the structure and administration of government” and defines “certain immunities and modes of proceeding, which are relative to personal and private concerns.”<sup>34</sup>

Of course, Hamilton lost the argument about the need for a Bill of Rights. But his underlying point is of great importance: the initial plan of government built in a check on arbitrary power even while it sought to grant power to the central government it was creating. No Amendment passed thereafter to provide further protection to the people could countermand that structural protection; indeed, to the extent that the Fourth Amendment sets up a clear

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29. ALEXANDER HAMILTON, THE FEDERALIST PAPERS, NO. 84, 512-514 (Clinton Rossiter, ed., Signet Classic 1999).

30. HAMILTON, *supra* note 29.

31. HAMILTON, *supra* note 29, at 512.

32. *Id.*

33. *Id.* at 513.

34. *Id.* at 514.

mandate for a judicial check on executive power to search by an insistence on a finding of probable cause, that structural protection is given a specific set of teeth.

This need for structural protections of liberty finds a further profound articulation in the philosophical writings of Phillip Pettit and his concept of antipower.<sup>35</sup>

For Pettit, the traditional notion of freedom, one he says was embraced by the Framers, was that true freedom lies in a system wherein no one is subject to the arbitrary power of another, regardless of whether arbitrary conduct actually occurs<sup>36</sup> He describes it in this way:

Under the conception of freedom as antipower, I am free to the degree that no human being has the power to interfere with me; to the extent that no one else is my master, even if I lack the will or wisdom required for achieving self-mastery. The account is negative in leaving my own achievements out of the picture and focusing on eliminating a danger from others.<sup>37</sup>

The actual act of interference is not nearly as critical as the elimination of an arbitrary power that allows a dominating entity to act without fear of opposition or consequence, and denies to the one subjugated either the capacity to assert himself in response, or to petition a neutral body to assert his position and punish such arbitrary transgressions.<sup>38</sup>

The best way to achieve antipower, Pettit argues, is to:

consider the introduction of protective, regulatory, and empowering institutions. I do not say that every institution will necessarily increase antipower, of course; some may have indirect, counter production effects, and empirical work will be required to determine which mix of institutions does best. I say only that protective, regulatory, and empowering institutions represent the sorts of options that we ought to be considering if we are interested in the promotion of antipower in a society.<sup>39</sup>

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35. Philip Pettit, *Freedom as Antipower*, 106 ETHICS No. 3, 576-604 (The University of Chicago Press 1996). I discuss this extensively in *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*. Antkowiak, *supra* note 20.

36. Pettit, *supra* note 35, at 576-78.

37. *Id.* at 578.

38. *Id.* at 579-80.

39. *Id.* at 590.

A constitutional Amendment that directly prohibits searches conducted unreasonably, and arbitrarily, and employs a system of review by a court holding the searcher to an independent standard, is certainly an institution in the service of antipower. A concept like probable cause, as a component of that institution, is a doctrine in service of a basic conception of freedom.

Giving vitality to the Fourth Amendment's protections is thus every bit as important as preserving federalism or separation of powers, that which Madison called "a double security . . . to the rights of the people,"<sup>40</sup> and what the Supreme Court later called a system to "reduce the risk of tyranny and abuse."<sup>41</sup> Tinkering with the meaning of probable cause is thus doing more than just allowing a given search in a given case; over time we risk altering a portion of the blueprint of a republic that we otherwise seem to be quite fond of admiring.

So we find that our search for the meaning of "probable cause" has led us into a passageway that leads close to the center of the political earth. And yet we still do not have much of a handle on the nature of it as a device to actualize the great goals it is seemingly positioned to achieve.

To say "we" here presupposes something quite philosophical but not something very practical. While John Locke may have been right that what the state of nature really lacks is "an

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40. Antkowiak, *supra* note 20, at 606 (quoting THE ORIGINS OF THE AMERICAN CONSTITUTION 183, 204-05 (Michael Kammen ed., Penguin Books 1986)).

41. Antkowiak, *supra* note 20, at 609 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). Parenthetically, one may note how separation of powers ideas are built into the probable cause procedure. Probable cause limits the potential for an oppressive government by involving all three branches in the probable cause equation. Probable cause exists as the determination of the likelihood of a particular crime, not just of a person being "bad" or suspicious.

In Maryland v. Pringle, 540 U.S. 366 (2003), a unanimous Supreme Court identified the issue as whether the officer had probable cause to believe Pringle committed the specific crime of felony drug possession. *Id.* at 370-73. Pringle, arrested in the company of two others in a car with a significant quantity of drugs and a significant amount of cash, was not merely present there; rather, the office was reasonable in inferring that there was "a common enterprise among the three men" that supported the belief each had violated the statute. *Id.* The legislature therefore has an initial role in defining the crimes for which searches can occur. The executive branch certainly plays a part in trying to enforce those laws by seeking authorization to search private places in which evidence may be found. And the judicial system operates, either before or after the fact of the search, to determine the legitimacy of the executive's efforts and to balance the needs of individual privacy. No single branch can act without the concurrence of the others.

established, settled, known law, received and allowed by the common consent to be the standard of right and wrong” he was also right that it also needs “a known and indifferent judge” to administer it.<sup>42</sup> While we all must search for the meaning of probable cause, it is our judges who will put that meaning into effect and guidance for them in this search is crucial.

As we will see, the job of searching for a practical meaning of probable cause to guard that “right to be let alone” and to make it a tangible component of the structural protection of liberty is not easy. The help we have given to judges to date hardly makes this job any easier.

#### *IV. The Courts and Probable Cause*

Clearly, the governmental official positioned to make probable cause a meaningful concept is a judge. Unlike in the case of proof beyond a reasonable doubt, where committees of citizens undertake the task of assessing the government’s request for authorization to punish someone,<sup>43</sup> the criminal system leaves the probable cause determination squarely in the lap of the judge. Whether the judge is passing on an application for a search warrant or assessing the validity of a warrantless search after it occurs,<sup>44</sup> it is the judge who must decide whether the facts

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42. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, 403 (Isaac Kramnick, ed., Penguin 1995).

43. I have discussed the matter of juries and reasonable doubt in two prior articles: Bruce A. Antkowiak, *Judicial Nullification*, 38 CREIGHTON L. REV. 545 (2005); Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: the Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L.J. 11 (2003).

44. See FED. R. CRIM. P. 41(b):

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district . . .

FED. R. CRIM. P. 41 (b) (1). See also FED. R. CRIM. P. 12 (d) which provides:

The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party’s right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

FED. R. CRIM. P. 12 (d).

and circumstances known by the police justified a level of certainty that authorized the invasion of privacy that was to occur or had occurred.

As we have seen, this is a matter of no small importance. But how is the judge supposed to do this? At the most basic level, a judge should begin by recognizing what “probable cause” is as a thing to know, and then assess some sources of insight as to how to know it.

a. Probable Cause as the Thing In Itself

While philosophers are sometimes wont to launch a discussion by pondering the “thing in itself,”<sup>45</sup> let us simply describe what probable cause is. Probable cause is a standard of proof. It describes a state of human certainty.<sup>46</sup> It is a point on a continuum upon which both the presumption of innocence and proof beyond a reasonable doubt also exist. According to a most thorough study of this point, the placement of probable cause on this continuum is a matter of some significance in its history.

In *Beyond Reasonable Doubt and Probable Cause*,<sup>47</sup> Professor Shapiro argues that the law’s concept of certainty derived in part from the notion by John Locke and others that anything based upon human testimony could never reach more than some level of probability, and that, as such, defining the degree of probability was crucial.<sup>48</sup> Probable cause came under more intense scrutiny of the law once the process that implemented it moved from reliance purely upon the suspicions of the alleged victim to the requirement that a neutral magistrate assess the evidence

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45. With apologies to Immanuel Kant, among others. See generally, *The Critique of Pure Reason* (Cambridge University Press 1998).

46. Grano, *supra* note 4. Professor Grano has said that seeking to understand “the broader issue of the degree of certainty that probable cause requires” is the primary issue that Supreme Court jurisprudence on the matter sometimes overlooks in favor of an assessment of the trustworthiness of the evidence upon which that level of certainty is based. *Id.* at 473-74.

47. BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE:” HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (University of California Press 1991).

48. SHAPIRO, *supra* note 48, at 60.

independently before an invasion of privacy could occur.<sup>49</sup> The evolution towards a judicial determination of probable cause meant objectively evaluating whether a defendant's conviction would likely be obtained based upon the evidence gathered to date.<sup>50</sup> Professor Shapiro concludes:

The American probable cause standard represents the latest stage in a long historical evolution in which the justification for arrest moves from the personalized suspicion of a directly involved party, through the generalized suspicions of a more distanced party based as much on the suspect's life-style as on particular events, to the rough estimate of a very distant official of the chances that a suspect will be convicted if tried.<sup>51</sup>

Thus, while nominally a noun, probable cause is much more an adjective, describing a state of certainty about a person's guilt based on identifiable facts that justify an invasion of his privacy. It then morphs readily into a most active constitutional verb, sanctioning that invasion. Examined merely in its noun form, however, it is a most difficult concept to grasp. It is not a tangible thing that can be measured in liters, meters, or degrees. Like any love, fear, or wonder, it cannot be quantified or objectified. Feelings may be discussed by analogies (as when we say that we love our neighbor as our self), but never measured by them, as they escape all common modes of measurement or calculation.<sup>52</sup>

But not being able to describe one's sense of love seldom has consequences that impact the privacy of individuals or defines their relationship with their government. Serious

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49. *Id.* at 135-43.

50. *Id.* at 142-44.

51. *Id.* at 145.

52. Indeed, any attempt that speaks of probable cause as an "it" is bound to fail, as the "it" is nothing more than a manner or means by which we try to make operative a deeper, shared consensus of our sense of justice. The attempt to use various disciplines not sensitive to this underlying truth is not only futile but dangerous, as we risk seriously losing focus on the fundamental meaning of the thing in such a process. In a prior work, I have discussed the concept of standard of proof in terms of proof beyond a reasonable doubt. I have tried to argue that it too is an imprecise term that has evolved over time in ways that are troubling, particularly when courts have tried to describe it as a tangible object. In that process, I submit, we turn the presumption of innocence on its head. Antkowiak, *supra* note 44, at 558-65.



consequences follow a judge's sense that he "feels" probable cause existed, so insight as to when that feeling should be recognized is vital.

Judges critically examining that "feeling" will use tried and true methods. As creatures of the law, they will look to precedent; as creatures that use language as the means of their craft, they will seek linguistic insight; as scholars envious of the precision of mathematics, they will dabble with arithmetic formulae; and as students of history, they will hope the past enlightens the present.

In many respects, each such path will lead to disappointment.

#### b. Sources of Possible Insight

##### *i. Probable Cause as the Orphan of Precedent*

There are two profound proofs that the Supreme Court has given up trying to define probable cause. First, in *Maryland v. Pringle*,<sup>53</sup> the Court said it was giving up:

On many occasions, we have reiterated that the probable-cause standard is a "practical, nontechnical conception" that deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." "[P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.<sup>54</sup>

Second, in *Illinois v. Gates*,<sup>55</sup> the Court advised judicial officers to apply "the totality of circumstances test"<sup>56</sup> to probable cause problems. That is not really a test at all; it is a pointless tautology identifying nothing a judge really needs to know.

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53. 540 U.S. 366 (2003).

54. *Pringle*, 540 U.S. at 370-71 (internal citations omitted).

55. 462 U.S. 213 (1983).

56. *Gates*, 462 U.S. at 230-31.

What court does not consider the *totality* of all circumstances relevant to any determination? Only an irresponsible court will pick and choose a few relevant circumstances to decide any issue under the law. To say that a court must consider the “totality” of the circumstances is thus to tell a court nothing whatsoever about *which* of the hundreds of circumstances it should consider that constitute the relevant totality.

For example, would the mother’s maiden name of the officer conducting the search be one of the circumstances to consider? Surely not, but does “the totality of the circumstances test” tell us why that is not a relevant consideration? This “test” is nothing more than the law’s concession that it cannot find words sufficiently helpful in its thesaurus to guide this crucial judgment. It is a white flag in a war of words. It reads: Do the best you can. Be reasonable.

Surely, lower courts can be given, and find, better guidance.

## *ii. The Failure of Language*

The inability of the Court in *Maryland v. Pringle* to find a sensible definition points to a general failure of nomenclature in this area. As Professor Shapiro has observed, attempts by the Supreme Court to define probable cause in the latter part of the 20<sup>th</sup> century failed to come up with definitions that did more than generally describe the concept of probability.<sup>57</sup> The failure is understandable:

We may be a long way from an involved individual’s subjective suspicions, but we are little closer to defining a place somewhere between mere surmise and beyond reasonable doubt – no doubt because we have no conceptual or linguistic stages between nothing and moral certainty.<sup>58</sup>

Professor Bacigal observes that “semantic interpretation” of the term “probable” is possible only with placing the term somewhere between the range of a 0.1% to 100%

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57. See, e.g., *Henry v. United States*, 361 U.S. 98, 102 (1959) (“probable cause exists where the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”).

58. SHAPIRO, *supra* note 48, at 147.

likelihood,<sup>59</sup> and argues that the attempt by the Supreme Court to use language describing probable cause “has neither improved upon nor worsened the linguistic uncertainty surrounding the term probable.”<sup>60</sup>

If neither the Supreme Court nor the authors of dictionaries can define terms that convey an accepted sense of when evidence reaches the magical melting point of probable cause, judges should abandon the effort early. To try to answer the question of what probable cause is simply by linguistics is an exercise doomed to failure. Poets, not lawyers, are best suited to express human feelings. Unless we are willing to take more of our law from Dylan Thomas than from Justice Thomas, we should abandon trying to find in words alone insight about processes critical to the freedom of the individual.

### *iii. The Imprecision of Mathematics*

Worse yet, mathematics fails us here. Any attempt to borrow the concepts of mathematics to solve the riddle of probable cause should be feared, even though the term “probable” seems to have led us into the land of numbers.

Math seduces lawyers with the siren song of precision, certainty, and constancy – the normal stuff our practice denies us. Thus, it is not surprising that first rate academicians will often flirt with importing mathematical principles into a legal concept that beckons us with a name so seductively statistical.

Although stopping short “of endorsing precise mathematical expressions of probable cause,”<sup>61</sup> Professor Bacigal argues extensively for the employment of principles of mathematical

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59. Ronald J. Bacigal, *Making the Right Gamble: the Odds of Probable Cause*, 74 MISS. L. J. 279, 281-82 (2004).

60. Bacigal, *supra* note 60, at 281-82. Later in his article, Professor Bacigal nonetheless gives five terms describing degrees of certainty and ultimately seeks to assign mathematical equivalents to them: “slightest possibility,” “reasonable possibility,” “substantial possibility,” “probability,” or “high probability.” *Id.* at 334. One has to wonder, however, if feelings are so unique to individuals that one man’s possibility is another’s high probability, to the point that any attempt at a rigorous analysis of this from a linguistic standpoint proves unsatisfying at best.

“expressions of probabilities” to “assist, if not exclusively control, probable cause determinations.”<sup>62</sup> He posits that properly used mathematical and scientifically valid profiles can assist in the probable cause determination,<sup>63</sup> and that mathematical probabilities can supplement traditional methods of assessing probable cause by courts.<sup>64</sup>

Professor Lerner, while observing that few courts “have summoned the courage, or foolhardiness, to propose a number (e.g. 30% probability for probable cause),”<sup>65</sup> argues for a framework of analysis for reasonableness in searches that plunges into the wilds of calculus. Using variables such as probability (P), the social benefit or value associated with the prevention or detection of a particular crime (V), the social cost or privacy intrusion resulting from a particular kind of search (C), and the discounting of that intrusion by the likelihood that a search will fail to uncover evidence (a “privacy multiplier”) (M), he proposes a formula as follows:  $P \times V$  is greater than  $(1 - P \times (C \times M))$ .<sup>66</sup> Calculators may need to be installed in each courtroom.

This is an intriguing analysis. Without question, it is a helpful tool to organize thoughts and priorities regarding the probable cause decision, but it hardly makes that decision any easier for a judge. Unless there is a catalog to which a court can look to assign a proper probability for the finding of contraband, a separate axis to measure the social benefit associated with the prevention or detection of a particular crime, and an the electronic scale to factor in the social cost arising from the particular kind of intrusion, the court is left exactly where it is now in trying to define the parameters of probable cause. He who sets the values on the variables is the one who determines the outcome of this interesting equation.

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61. *Id.* at 339.

62. *Id.* at 303-04.

63. *Id.* at 301-02.

64. *Id.* at 309, 338-39.

65. Lerner, *supra* note 3, at 995-96.

66. *Id.* at 1019-28.

Probable cause is a statement of science, but *political science*, one in which the language of mathematics is a foreign tongue. Mathematicians would bristle if a student solved an equation by pointing to a “reasonable” answer instead of the right one; mathematicians should understand that what we measure in the law lies at a golden mean between the perfection of their numbers and the lyrics of the poet.

*iv. The Frustrating Inadequacies of History*

Judges in search of this golden mean will turn to history for two broad purposes. First, as a general matter, the historical context of the term “probable cause” may provide some insight as to its proper current application and, second, if the actual intent of the Framers may be discerned, something of a mandate will exist to apply the term in its original spirit.

Unfortunately, according to a broad judgment of the academic community, neither purpose may wholly be fulfilled.

a. The Search for the Historical Meaning of Probable Cause

The history of probable cause (really, the whole of the Fourth Amendment) has been sketched many times by outstanding historians.<sup>67</sup> As indicated earlier, Professor Shapiro has given an in-depth history of the evolution of probable cause, particularly from a procedural standpoint, tracing its origins from the suspicion of the wronged party to a more objective assessment made by a detached judicial officer.<sup>68</sup> Most unearth the earliest manifestations of probable cause language in 13<sup>th</sup> century England in the concept of “suspicion” that supported actions by the constable in effecting arrests.<sup>69</sup> Suspicion sufficient to warrant intervention could

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67. See, sources noted *infra*.

68. SHAPIRO, *supra* note 48, at 135-36.

69. Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155, 158-59 (1982).

come from the word of “good and responsible men” as well as certain circumstantial proofs justifying the intervention by a court for further investigation.<sup>70</sup>

For our purposes, however, any further, detailed recitation of the details of this history is unimportant. What is of interest is the widespread judgment of historians that while probable cause may appear in the broad contours of history, no specific meaning of use to a modern understanding of its core purposes is possible from a study of those contours.

Results of attempts to draw common law lessons on the meaning of probable cause have been described as miscellaneous and contradictory, and wrong in most respects,<sup>71</sup> leaving such attempts as largely pointless exercises in determining the modern meaning of the concept.<sup>72</sup>

The relevance of history has been described as “disputable”<sup>73</sup> with scholarship about it “badly confused”<sup>74</sup> and generally of limited utility.<sup>75</sup> Professor Rudovsky indicates that “there is no settled judicial or scholarly position on the meaning, purpose and construction of the Fourth Amendment,” rendering the matter of its history one of nominal importance at best in modern interpretation.<sup>76</sup>

Indeed, many of these fine historical tracts agree that resort to history alone can provide us no set meaning of probable cause. Rather, the authors have concluded that attempts to define or describe it have produced variable, ambiguous, and shifting meanings over time, to the point that it is arguably incapable of being defined in any critical way simply by reference to its

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70. Weber, *supra* note 70, at 159-61. Class bias in the criteria to justify “suspicion” was evident. *Id.* at 162. See also Sklansky, *supra* note 12, at 1805-06.

71. Lerner, *supra* note 3, at 972-73.

72. Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642 (1998).

73. Grano, *supra* note 4, at 478.

74. Amar, *supra* note 12, at 759.

75. RUDOVSKY, *supra* note 21, at 301.

76. *Id.*

history.<sup>77</sup> Justice Stevens made this point in his recent concurring opinion in *Georgia v. Randolph*:

The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive. This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance of changes in our society.<sup>78</sup>

One of the problems in dealing with the history of the Fourth Amendment is that its history occurred, as history is wont to do, so long ago. Considering a centuries' old jurisprudence in a modern context is valuable if and only if most of the underlying assumptions that were extant during the historical period continue to be operative in the modern age. Viewing history in context is thus critical and may, in respect to certain matters, limit the utility of Fourth Amendment history in the 21<sup>st</sup> century.<sup>79</sup>

Despite these criticisms, of course, certain judges continue to use history to justify their positions. As writers have pointed out, however, judges on both sides of any case are often able to use history to support their views or provide political cover for unpopular decisions.<sup>80</sup>

To say that the history of the Fourth Amendment is inconsistent and contradictory is, however, to err much as one errs who claims that statistics lie. The history of the Fourth

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77. Colb, *supra* note 73; Grano, *supra* note 4, at 478; Bacigal, *supra* note 60, at 288; SHAPIRO, *supra* note 48, at 147. For the American experience, it is wise to recall another glitch in the resort to history for insight on the meaning of probable cause. In citing English history for the purpose of understanding probable cause, we must recognize that we had the temerity to rebel against England and reject the history that led to summary search powers that caused so many of our citizens so much distress at the hands of officials of the Crown. Maclin, *supra* note 21, at 959-62; Grano, *supra* note 4, at 478.

78. 164 L.Ed.2d 208,228 (2006).

79. Maclin, *supra* note 21; Colb, *supra* note 73; Bacigal, *supra* note 60, at 288; RUDOVSKY, *supra* note 21, at 301.

80. Maclin, *supra* note 21, at 898-901, 909; Colb, *supra* note 73; Sklansky, *supra* note 12, at 1809. Also. Compare the opinions of Justices Stevens and Scalia in *Georgia v. Randolph*, 164 L.Ed. 2d 208 (2006). One author has described any court's reference to history as "purely forensic." Lerner, *supra* note 3, at 974-76.

Amendment is what it is; it may be gleaned from the annals of English history, the writings of Hale and Coke, or from the ancient cases that surrounded its articulation. In the end, it is the use of history by current authorities in the name of a “new originalism,” that is problematic. The frustration this causes is summarized by Professor Maclin in this way:

The thesis of this article is that the Court’s use of history in Fourth Amendment cases has been unpredictable and inconsistent. Consequently, the Article proposes that the Court stop considering the historical origins of the Fourth Amendment unless it is able to develop a more effective and consistent method by which do so. . . . Although history can provide significant insights into the Framers’ thinking about the Amendment, the Court’s current use of the Fourth Amendment history neither accurately reflects the Framers’ “underlying vision” of the Amendment nor provides a useful methodology for deciding modern search and seizure cases. Accordingly, unless the Court develops a more appropriate method for interpreting the complexity of the Fourth Amendment’s origins, it should stop relying on history when deciding Fourth Amendment cases. It is in this sense that this Article suggests the Court should simply let sleeping dogs lie.<sup>81</sup>

This view provides the transition point to the second question we ask of this history. If its long history provides no singular message about its meaning, may we at least narrow the focus and see what those who wrote this term into the Fourth Amendment meant by it when they put it there.

#### b. The Search for the Framers’ Intent

Judges who make a specific search through history in hopes of finding the Framer’s understanding of probable cause that explicitly controls a current pending case may well come to a conclusion reached by many scholars: the Framer’s intent was that there should be no fixed meaning to probable cause at that level.

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81. Maclin, *supra* note 21, at 897-98 (internal citations omitted). Professor Maclin points out the intriguing anomaly that judges intent on giving the government more leeway to conduct searches often times must disregard history since, for example, in knock-and-announce and exigent circumstances cases, history is contrary to the leeway the courts have granted. *Id.* at 917, 937.



Professor Lerner argues that probable cause is neither the “north star” of Fourth Amendment jurisprudence nor something the Framers intended to be cast “in constitutional amber.”<sup>82</sup>

Professor Amar has also posited that probable cause was not to be a fixed standard; the seriousness of the harm and the intrusiveness of (and the reason for) the search are all matters that should affect the determination of whether the search was reasonable.<sup>83</sup>

Professor Bacigal claims that the variation in the standards of probable cause appearing over time<sup>84</sup> affected the Framers to the degree that they did not even consider the common law ideas of it, even if a clear common law idea of probable cause ever existed.<sup>85</sup> To them, the term “probable cause” was not a term with an established legal meaning.<sup>86</sup> He concludes that probable cause has ultimately been reduced today to what it has been in history, simply an admonition to “just use your common sense and act reasonably.”<sup>87</sup>

Professor Sklansky provides a most insightful commentary on why probable cause is a concept detached from the bounds of history and some rigid formulation of the Framers’ intent.<sup>88</sup> He points out that the classic test for defining when a police action is a search has an element society’s willingness to recognize the defendant’s expectation of privacy as reasonable.<sup>89</sup> The *society* doing this recognizing is a society of the defendant’s contemporaries, not those who expected things in and around 1791.<sup>90</sup> For this issue, by definition, resort to history is proper only if the expectations remain the same.

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82. Lerner, *supra* note 3, at 954, 976-78, 1029.

83. Amar, *supra* note 12, at 784-85.

84. Bacigal, *supra* note 60, at 283.

85. *Id.* at 284.

86. *Id.*

87. *Id.* at 317-18.

88. Sklansky, *supra* note 12.

89. *Id.* at 1739-40.

90. *Id.*

Professor Sklansky also argues generally that the Framers did not bar a particular class of searches that they knew at the time to be overly intrusive, but instead adopted a standard of reasonableness to be interpreted over time and in the context of the American society then doing the interpreting.<sup>91</sup> He urges that the Fourth Amendment was not meant to be a shorthand reference to the then existing common law because, had that been the Framers intent, they would have said so.<sup>92</sup> To this point, I would add that when the Framers intended to refer to existing common law principles, they did so explicitly, as in the Seventh Amendment.<sup>93</sup>

Any attempt to identify with exactitude the Framers' original intent thus fails, Professor Sklansky argues, because the Framers did not intend to set forth this jurisprudence in the concrete of the age in which the Amendment was penned.<sup>94</sup> Rather, insofar as it evinces the Framers' intent, the history of probable cause may be best read as describing a paradigm of the kind of arbitrary abuse that the Framers thought should be curtailed now and in the future.<sup>95</sup> History puts a burden of judgment on courts, not the mandate to become better historians.<sup>96</sup>

But is that judgment unrestrained by any core meaning to probable cause that exists regardless of the date on which the issue arises? If we read the Framers' intent to be that probable cause is universally flexible in content and a constitutional chameleon in form we will, in a nervous age, read it out of the Fourth Amendment. This will happen if we overtly or

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91. *Id.* at 1791.

92. *Id.* at 1810.

93. U.S. CONST. Amend. VII. The Seventh Amendment provides:  
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Id.*

94. Sklansky, *supra* note 12, at 1810.

95. *Id.*

96. *Id.*

covertly agree that the seriousness of the offense under investigation may be weighed to the extent that it supersedes other factors in supporting a probable cause finding.

While some scholars agree that, in writing the Fourth Amendment, the Framers were not concerned with advancing the goals of federal law enforcement because they saw the reach of the federal government as far less than what it is today,<sup>97</sup> many also accept the role of the seriousness of the offense in the probable cause equation, even though that acceptance would radically expand the search power of the state.<sup>98</sup>

The significance of weighing the seriousness of the offense as an unlimited factor in the probable cause finding cannot be understated. If probable cause is a feeling of certainty, based upon facts gathered that suggest the guilt of a defendant of a specific crime, taking into account the seriousness of that crime in an unbridled way radically lowers the quantum of facts necessary to justify the intrusion into privacy. If (forgive the mathematics) probable cause equals facts times the seriousness of the crime, the closer the seriousness of the crime reaches an ultimate point, the lesser are the facts needed to justify the search. Putting a crime such as terrorism into this equation means that intrusions into privacy could be occasioned by just about any level of facts that the government could offer as a justification.<sup>99</sup>

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97. Maclin, *supra* note 21, at 917-19; Thomas, *supra* note 2, at 157-62.

98. Colb, *supra* note 73, at 1724-25; Lerner, *supra* note 3, at 1019-20, 1027-28; Amar, *supra* 12, at 784-85, 801-02; Bacigal, *supra* note 60, at 323-33.

99. A variant of the argument that the seriousness of the crimes should be taken into account is presented by Professor Bacigal. He argues that where crimes present a “danger of imminent repetition,” a lesser form of probable cause should be required. Bacigal, *supra* note 60. He would make a distinction between investigating crimes that have already occurred and ongoing criminal activity that threatens future societal harm. Bacigal, *supra* note 60, at 323-33. But few crimes ever seem to be wholly self-contained, without portending any future such criminal activity. One murder may well lead the police to conclude that a dangerous and desperate individual is on the loose who must be captured before they kill again. Moreover, the crime that probably occasions more searches than any other single crime is the interdiction of drugs and drug related contraband. By nature, these are all crimes which are ongoing and which threaten future societal harm. To adopt the standard that lowers the quantum of proof necessary to find probable cause here is to effectively lower it across the board in a way that would render the probable cause finding a brutal protection of this sort of privacy intrusion that the Fourth Amendment seems to have been constructed to prevent.

So accounting for offense seriousness may, in certain cases, take probable cause completely out of the Constitution. Is that possibly what the Framers intended? If so, why did they bother to write it down? If so, why does probable cause continue to exist in our collective jurisprudential conscience as a relevant issue?

A simple fact of legal life shows that there is a core to the understanding of probable cause not subject to the whims *de jour* of a court. We are governed by a Constitution that is, no matter what else we may think it is, a law that, perhaps inconveniently to some at times, is written down. Words that drafters put on paper must be put into force by courts charged with the duty of interpreting and applying them. While the Framers did not provide a glossary to the Bill of Rights critically defining “probable cause,” and while they may well have understood that it was a term that would have to be interpreted in a contemporary context by judges of the day, they did not give the courts free reign to do whatever they pleased. Having gone to great lengths to limit the powers of the legislative and executive branches of government, it is absurd to assume that the Framers let judges operate unrestrained by anything but their individual good faith. Indeed, history demonstrates that no one put blind faith in judges as the final outpost against tyranny.<sup>100</sup> Judges, too, have to follow the “rule of law.”<sup>101</sup>

By advising judges on the implementation of probable cause, we are not simply being the court jesters to the king. We are helping the courts understand that the supreme law of the land, a law deriving its authority from the consent of the governed, uses a specific term to restrict the power of the courts as they, in turn, define the power of the executive to invade personal privacy.

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100. Antkowiak, *supra* note 44, at 31-34.

101. The “rule of law” idea is, of course, a central concept of the Enlightenment theory upon which so much of the constitutional theory is based. *See generally*, Frank Marini, *John Locke and the Revision of Classical Democratic Theory*, 22 WESTERN POLITICAL QUARTERLY 172, 175-76 (March 1969).

The term, the restriction, has meaning that transcends the vagaries of the moment. It has a core that lasts.

Further evidence of a core to an understanding of probable cause lies in this. History teaches us that probable cause is a very old friend, one that has been around the law for hundreds of years. That longevity is the product of something quite primal. In an oft quoted article on probable cause, the author writes:

But shifting standards as to the precise amount of cause needed does not conceal a fact that the insistence on probable cause is a glory of American legal history, and of the English and common law, as well as of standards in the English speaking world. And this demand for adequate grounds for governmental intrusions like arrest is echoed in many other countries and found in international instruments, reflecting a deeply felt yearning on the part of mankind in general.<sup>102</sup>

It has survived despite many times of great exigency. Its survival as a meaningful concept tells us there is substance behind its form. Somehow, there must be a core understanding of the process of probable cause, one that sustains in days and times in which the magnitude of the potential offenses may readily wipe out the requirement altogether if the calculus for finding it would permit it. That understanding, I submit, reflects even deeper core values of justice that probable cause serves, accounting for its longevity.

Such understanding is to be found in a philosophical analysis of probable cause, one taking into account the reasoned process of societal consensus to which judges can refer when they make the determination as to whether the government has justified the invasion of the privacy of the citizen before them.

Why we are just the latest in a long line of citizens that includes our Framers (and will include generations hence) to yearn for probable cause, and how that yearning may be satisfied

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102. Weber, *supra* note 70, at 166 (internal citations omitted).

in a nervous or any other age, are critical matters that lie at a level of meaning deeper than history may readily reveal. An effort to find the core of the concept it reflects, is a question answerable by neither mathematics nor science nor history nor even law *per se*. It is in the basic philosophy of the Republic that we must look. That philosophy is best seen through the eyes of the science of politics, particularly, the work of John Rawls.<sup>103</sup>

#### *IV. Searching for Probable Cause in New Venues: Philosophy and Political Science*

The political philosophy of John Rawls may help us address two important matters about probable cause. First, through an adaptation of his “original position” analysis, a method to think about probable cause determinations may be found. Then, in his broader concepts of public reason, we may see why probable cause, as a concept that arises from a rational societal consensus, has such longevity and is so consistently compelling.

##### *a. Finding Probable Cause Through a Reasoned Consensus: Rawls’ Original Position*

If we understand probable cause to be an ancient yearning on the part of individuals to create a livable space between themselves and their governments, an intuitive sense<sup>104</sup> that there is indeed a fundamental right to be let alone that a process administered by courts can implement, then there must be some way to understand how probable cause manifests itself in time and through time, in times of great exigency, and in times when states of relative calm abide. To find that core understanding of the probable cause process we could ask “the ablest

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103. Having invoked his name, an important caveat and disclaimer is appropriate. I do not profess to be versed in each of the delicate intricacies of a philosophy that Rawls himself has evolved and refined over a considerable period of time. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly, ed., The Belknap Press of Harvard University Press 2001); JOHN RAWLS, *A THEORY OF JUSTICE* (The Belknap Press of Harvard University Press 1971); John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958).

Nor do I seek to adopt or import all of the concepts that he weaves together in the complex tapestry of his form of political liberalism. Rather, as a student of Rawls, I borrow from him certain discrete conceptions that I posit are entirely pertinent to a discussion of probable cause. I am also aware of the reasoned criticism of Rawls by authors such as Etzioni. ETZIONI, *supra* note 2, at 7-8, 11, 91-94.

104. Weber calls it “the horse sense of the ages.” *Id.* at 161.

and the purest men.”<sup>105</sup> But history has taught us that many of the greatest political wisdoms of our time come from not a single voice, but from the chorus that comes from the reasoned process of democratic consensus. How do we access that voice? How do we frame the question we wish to ask it?

The question is framed by considering that there are always three distinct parties affected by a court’s determination about whether the government’s evidence is sufficiently compelling to merit the finding of probable cause and authorize the invasion of privacy that flows from it.

First, of course, there is the person whose privacy is invaded. While writers sometimes view that individual in less than flattering terms,<sup>106</sup> we must remember that search and seizure rules operate to protect innocent people; for we are all, at least as the fairytale we have been told in law school goes, presumed innocent until a jury of our peers judges us otherwise. Of course, we may sometimes actually be “innocent” in that we really do not have the cocaine or the bloody knife in our home when the police battering ram shatters our door.

The second person in the equation is the victim of the crime under investigation. We may be them as well from time to time.

The third party at the table of probable cause is the society in general, or at least those proximate enough to the particular case to be aware of the decision the court makes about whether the search met the probable cause standard. They (we) seek the benefits of a constitutional system that frustrates the formation of a tyrannical government but enjoys the benefits of a government that forestalls the terror of anarchy. This third entity would like to believe there is a moral basis to our governmental philosophy, that is, a basic orientation to

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105. *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., dissenting).

106. Loewy, *supra* note 5; Amar, *supra* note 12, at 796-97.

provide a system that allows the individual to live in an environment that maximizes his ability to utilize his reason in the service of higher pursuits of his own choosing.<sup>107</sup>

To one degree or another, all three entities, that is, each of us, yearn for justice. To weigh and account for these interests is the essential philosophical question of probable cause.

Various scholars posit a proper weighing of these interests, using various formulations that reflect underlying, *a priori* judgments about the “proper” nature of things.<sup>108</sup>

What is critical, though, is that whatever approach we take focus on the issue that the Fourth Amendment addresses in its most essential terms: the proper relation between the individual and the government. All of the scholarly approaches noted in the margin, as well reasoned and thoughtful as they are, make judgments about that relationship that purport to be empirically obvious. They proceed from an assumption about first principles and, indeed, while

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107. See Antkowiak, *supra* note 44, at 567-76; RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHTS IN THE ORIGINS OF AMERICA* (Northern Illinois University Press 2000).

108. Presumably, Professor Lerner would have a judge affix the values to his reasonableness framework, making some calculation of the social benefit of the search as well as the degree of privacy invasion multiplied by, of course, his privacy multiplier. Lerner, *supra* note 3, at 1019-28. It is not clear, however, how a judge should go about fixing those standards other than by employing raw intuition on a case-by-case basis.

Professor Grano tells us that the American Law Institute (ALI), in its 1975 Model of Criminal Procedure, disdained the term probable cause, using instead “reasonable cause” based upon its *a priori* judgment that society needs efficient crime prevention more than it needs personal privacy. Grano, *supra* note 4, at 495.

Professor Grano himself argues that the probable cause finding, one that balances “individual interests against community interests” is one that, if it is understood to mean a factual finding of more probable than not, “excessively exalts the individual.” *Id.* at 497. He calls for the implementation of a “community model,” one which places as its paradigm the notion that if an individual shares the benefits of the community he must “make reasonable sacrifices” on behalf of it in order to solve crimes. *Id.* He argues that in such a case, it would be permissible to arrest ten people, nine of whom are presumably innocent, and expect them to sacrifice their liberty and privacy to solve the crime committed by one of them. *Id.* “Most probable cause issues should involve only the question of whether the police had a well grounded suspicion concerning the target of their action.” *Id.* (elevating, presumably, the interests of the community he believes are paramount).

In his 1994 article, *Fourth Amendment First Principles*, Professor Amar argues that placing the remedy for probable cause (and other Fourth Amendment) violations in the criminal system is itself a societal choice that achieves what he posits are ineffective results. Primarily, he argues that the exclusionary rule rewards the guilty by allowing them to suppress evidence of their crime and, by doing so, elevates the criminal defendant to “a kind of private attorney general.” Amar, *supra* note 12, at 793-97.

As an enforcer of the Fourth Amendment, Amar labels defendants a terrible and “awkward champion,” having no extended view of the meaning of the Amendment and caring only about suppression rather than overall societal views. *Id.* at 796. Compensation for a violation of the Fourth Amendment should not “flow to guilty.” *Id.* But rather, tort actions wherein monetary and injunctive relief could be granted should be preferred. *Id.* at 815-19.



a judge struggling with a probable cause issue would welcome the ability to ground a decision by reference to such principles, they must first be comfortable in the methodology used to identify them. For such a methodology, I propose that the judge seek to understand the process by which the governed functions in its most able and pure state to reach a rational consensus about the core values of justice probable cause seeks to serve. The judge, I submit, may find a proper methodology to that end in Rawls' concept of the *original position*.

A well-ordered society, Rawls says, is one in which everyone accepts the same political conception of justice accepted by everyone else; the society then employs as its main political and social institutions structures that serve those principles of justice, and fosters a willingness in its citizens to apply those principles as their duties and obligations in society require.<sup>109</sup> "In a well-ordered society . . . the public conception of justice provides a mutually recognized point of view from which citizens can adjudicate their claims of political right on their political institutions or against one another."<sup>110</sup>

Implemented in a "fair system of cooperation," these principles are not derived from an "authority distinct from the persons cooperating," or from "natural law"; rather, they proceed from an agreement among "free and equal citizens" who negotiate them rationally and with an eye on what they regard as their "reciprocal advantage."<sup>111</sup> That agreement arises in the first instance in the Rawls' process of "original position."<sup>112</sup>

He assumes that persons acting on self-interest and employing reason come together for the purpose of negotiating the rules under which they will be governed once a "veil of

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109. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly, ed., The Belknap Press of Harvard University Press 2001).

110. *Id.* at 8-9.

111. *Id.* at 14-15.

112. *Id.*

ignorance” is lifted and their society is formed.<sup>113</sup> They negotiate these rules not knowing who they will be once that veil of ignorance is lifted, but knowing that the principles they negotiate will bind them in future circumstances regardless of what position they find themselves in once their society is formed.<sup>114</sup> The process that a rational person would go through under these circumstances is simple:

Hence each person will propose principles of a general kind which will, to a large degree, gain their sense from the various applications to be made of them, the particular circumstances of which being as yet unknown. These principles will express the conditions in accordance with which each is the least unwilling to have his interests limited in the design of practices, given the competing interests of the others, on the supposition that the interest of others will be limited likewise. The restrictions which would so arise might be thought of as those a person would keep in mind if he were designing a practice in which his enemy were to assign him his place.<sup>115</sup>

As one negotiates not knowing on which rung of the social ladder he would be at the time society comes into being, one carefully calculates his rational judgments to insure that he does not find himself, by the operation of chance, so totally disadvantaged that he would find life within that society intolerable. The negotiator will write the rules, a) dispassionately, before exigencies cloud his judgment;<sup>116</sup> b) rationally, using his best faculties; c) with self interest in mind, and d) blindly, such that he can live in the world his rules will govern.<sup>117</sup>

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113. *Id.*

114. John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 170 (1958); RAWLS, *supra* note 111, at 15-16.

115. Rawls, *supra* note 111, at 172. An excellent rendering of Rawls’ theory of justice in this regard is presented by Professor Samuel Gorowitz in his essay *John Rawls’ A Theory of Justice*, reproduced in “Contemporary Political Philosophers.” Dodd, Mead and Company New York (1975) at page 272 and following.

116. It is not time to fashion such a methodology for probable cause when planes are being flown into towers, or in the immediate aftermath of acts of mass murder. As in the days following the American Civil War, the temper of the times may not allow “calmness in deliberation.” *Milligan*, 71 U.S. at 102. But times exist when matters of such importance can be discussed without passion or the “admixture of any element not required to form a legal judgment.” *Id.* Judges need to use a process that carefully, rationally, and dispassionately accounts for the interests of the three parties in every probable cause/search and seizure equation.

117. Rawls’ approach has sometimes been compared with or, at least, spoken of in the same context as, a political application of the biblical Golden Rule. *See generally*, Louis Kaplow and Steven Shavell, *Fairness*

Rawls, of course, does not assume that anything like the “original position” has or actually could take place. It is, however, an important “thought-experiment for the purpose of public and self-clarification.”<sup>118</sup> It is a way to determine that “the principles of justice the parties would agree to . . . would specify the terms of cooperation that we regard – here and now – as fair and supported by the best reasons.”<sup>119</sup>

Applying this “thought-experiment” to our analysis of probable cause is minimally insightful and, at maximum, quite exquisite.

We assume that the three parties (in effect, ourselves projected into the different roles), positioned behind a veil of ignorance, are negotiating a rule about how much information the government should have before it is permitted by the courts to intrude into the privacy of an individual. The negotiators understand that when the veil of ignorance is lifted, they will apply that rule regardless of where they find themselves in the probable cause/search triangle.

As they may be the victim of the crime under investigation, they would certainly not want police officials to be so hamstrung in solving it that searches would not take place unless the perpetrators were kind enough to expose the evidence to plain view.

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*Versus Welfare*, 114 HARV. L. REV. 961, 1016, n.106 (February 2001); David Barnhizer, *Truth or Consequences in Legal Scholarship?*, 33 HOFSTRA L. REV. 1203, 1229 (Summer, 2005); George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 282, n. 50 (November 1998).

It is also an approach that resonates of John Locke. In the Second Treatise, Locke writes that reason, which is the law of Nature, teaches that “no one ought to harm another in his life, health, liberty or possessions.” LOCKE, *supra* note 43, at 396. Charity towards all is, apparently, good political science.

Even earlier than Locke, Richard Hooker would extol reason as a matter of divine origin but one so universal that it would bind all men as rational beings, whether they ascribed to sacred scripture or not. While scripture and reason together were necessary for complete knowledge, reason could provide a common basis for governance and a justification for all positive law. See DANIEL F. EPPLEY, *THE REFORMATION THEOLOGIANS: RICHARD HOOKER (1554-1600)*, at 258 (Carter Lindberg, ed., Blackwell Publishers 2002); DEBORA KULLER SHUGER, *HABITS OF THOUGHT IN THE ENGLISH RENAISSANCE: RELIGION, POLITICS, AND THE DOMINANT CULTURE*, at 27-28 (University of Toronto Press 1997); W.D.J. CARGILL THOMPSON, *THE PHILOSOPHER OF THE “POLITIC SOCIETY”*, at 26-27 (W. Speed Hill, ed., The Press of Case Western Reserve University 1972).

118. RAWLS, *supra* note 111, at 17.

119. *Id.*

However, they may also be the person whose privacy is invaded by that search. They must therefore afford the target of the search at least the presumption that the invasion of privacy would be troubling in any event and shocking if a mistake resulted in a truly (not just presumptively) innocent person's home being searched.

Finally, they may be a neighbor knowledgeable about the resolution of the probable cause question that directly affected the victim and target. That neighbor wants to view the search process involving the other two with a sense of security at the reasonable ability of police to enforce the criminal laws, but without the fear that the police have the unbridled and arbitrary capacity to threaten intrusions in places where the right to be let alone has its most profound meaning.

What rule would we agree to if there was an equal probability that we would fill one of these three roles but have to write that rule in advance, not knowing who we would be when the rule was applied? If we did not know which of these three we would be when the veil lifted, would we not fashion standards for probable cause that we could live with regardless of our place in the ultimate resolution of the search decision?

The probable cause equation cannot be determined by looking from only one of these perspectives. To achieve a reasoned, balanced judgment, a court must recognize that all three considerations are valid and must be taken into account when it is determined whether a particular search has exceeded the bounds of reasonableness due to an insufficient factual basis for the governmental intrusion.

For a judge, the question of probable cause thus becomes: would a rational, self-interested person adjudicating this case, find the amount of evidence presented at the time of the

search sufficient to justify it regardless of whether they would turn out to be the victim of the crime, the person searched, or the neighbor down the street? If so, probable cause exists.

For judges to think of the roles in a “veil of ignorance” manner is to reason in the best posture to uncover the core principles of the protection of privacy in a civilized world. It is a way to defeat the presence of arbitrary power of government that the Fourth Amendment espouses and the process of probable cause protects. A judge trying to determine whether probable cause exists in a given case, and presented with an argument that the seriousness of the crime charged justifies a search despite the absence of facts that would justify the intrusion of privacy in other circumstances, must ask himself whether all three of the parties in the probable cause triangle, when sitting behind the veil of ignorance, would have agreed that in such case the search should proceed even if it meant their door being kicked in.

The Rawls’ conception does not occur in a fantasy world in which threats of terrorist attacks are unknown or disregarded. Like the founders of the Republic extolled in *Ex Parte Milligan*, the negotiators behind the veil are familiar with the struggle of persons against tyranny and anticipate the exigencies that will befall any republic during the course of its history.<sup>120</sup>

The rules for probable cause, as conceived in the Rawls’ veil of ignorance manner, have a consistency over time; they represent a law “for rulers and people . . . at all times, and under all circumstances,”<sup>121</sup> as they are adopted for “the best reasons.”<sup>122</sup> Rules written by rational people pursuing self-interest and anticipating that they could be any one of three persons within the probable cause triangle are rules framed for the purpose of “guarding the foundations of civil

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120. *Milligan*, 71 U.S. at 109, 124-25.

121. *Id.* at 120-21.

122. RAWLS, *supra* note 111, at 17.

liberty against the abuses of unlimited power.”<sup>123</sup> They are rules for times of great stress and urgency and afford to government all the power it needs to survive.<sup>124</sup> Any later argument that such rules would have to be amended in order to preserve that nation would be subject to the criticism that if such argument were true “it could well be said that a country, preserved by the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”<sup>125</sup> After all, the rules were written neither by members of a suicide pact nor by lambs so desperate for security that they were willing to be lead to slaughter by the hand of a tyrant.

Will this process always and invariably produce the same answer in each judge who applies it? Of course not. The human factor in judges is all too real to expect that any “thought-experiment” will produce consistently predictable results. But this notion does chart a common course, one that accounts for all the essential considerations in a rational manner consistent with both the primacy of the individual and the needs for an ordered and orderly society.

#### b. Probable Cause and Public Reason

For Rawls, contemplation of the basic principles of society does not end when the veil of ignorance is lifted. Reason, and the process of rational consensus, is a powerful force once unleashed by political structures that look to the consent of the governed for their legitimacy. The historical “yearning” for probable cause may, it turns out, be reflective of this indomitable force since enforcing a probable cause process to check arbitrary powers of government is just so, dare we say it, reasonable.

Rawls discusses several processes that occur once the veil is lifted and a well-ordered society proceeds. For example, rational people, he tells us, engage in an ongoing process of

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123. *Milligan*, 71 U.S. at 127.

124. *Id.* at 120-21.

125. *Id.* at 127.

“public justification,”<sup>126</sup> which is “a political conception of justice for a society characterized, as a democracy is, by reasonable pluralism.”<sup>127</sup> He describes how public justification works in a well-ordered society in this way:

We saw that in a well ordered society effectively regulated by a publicly recognized political conception of justice, everyone accepts the same principles of justice. These principles provide, then, a mutually acceptable point of view from which citizens claims on the main institutions of the basic structure can be adjudicated. An essential feature of well ordered society is that its public conception of political justice establishes a sheer basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just. This is the meaning of public justification.<sup>128</sup>

Public justification is unlikely to occur on all principles in a political society. However, Rawls hopes that consensus on the basic principles (the “constitutional essentials”) which govern the general structure of government and the basic rights and liberties of citizenship (including freedom of thought, association and conscience) will be within that consensus, all governed by the rule of law.<sup>129</sup>

A component for achieving this sense of public justification is what Rawls calls reflective equilibrium, a process whereby individuals internally sort out through reason and self interest those principles they find most conducive to their own best interest, and then, by taking into account principles of justice espoused by others in their society, achieve a wide reflective equilibrium – that is, that “the same conception [of justice] is affirmed in everyone’s considered judgments.”<sup>130</sup> It is as if the negotiation behind the veil was perpetually ongoing, done not with a gun placed to anyone’s head, but with the rational recognition that times of great exigency may

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126. RAWLS, *supra* note 111, at 7.

127. *Id.* at 26.

128. *Id.* at 27.

129. *Id.*

130. *Id.* at 31.

well be just over the horizon and principles solid enough to sustain us through those times need to be affirmed now. The effort is to achieve something quite practical. “The most reasonable political conception for us is the one that best fits all our considered convictions on reflection and organizes them into a coherent view. At any time, we cannot do better than that.”<sup>131</sup>

For Rawls, the original position, reflective equilibrium, and public justification become further involved in the value of public reason in a constitutional democracy. Professor Larmore describes public reason in this way:

Its concern is the very basis of our collectively binding decisions. We honor public reason when we bring our own reason into accord with the reason of others, espousing a common point of view for settling the terms of our political life. The conception of justice by which we live is then a conception we endorse, not for the different reasons we may each discover, and not simply for reasons we happen to share, but instead for reasons that count for us because we can affirm them together. This spirit of reciprocity is the foundation of a democratic society.<sup>132</sup>

As the product of the rational forces that form society, this consensus is of consummate importance.

But it is more. The original position may be the product of rules that stress rationality and self-interest, but the veil of ignorance changes the nature of that process from an exercise in selfishness to one of public mindedness; the rules imposed on the negotiation by the veil constitute, Larmore tells us, “moral limits” on the information the negotiators use to decide the rules they write for society.<sup>133</sup> What comes from behind the veil is a sense of a shared, common good that is then publicly affirmed, defining what a “well-ordered” society must be.<sup>134</sup> Achieving

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131. RAWLS, *supra* note 111.

132. CHARLES LARMORE, *THE CAMBRIDGE COMPANION TO RAWLS: PUBLIC REASON*, 368 (Samuel Freeman, ed., Cambridge University Press 2005).

133. LARMORE, *supra* note 136, at 367.

134. *Id.* at 368.



this is something reasonable people will yearn for over time and, even through periods of passing irrationality, constitutes the home to which rational people will return.

The longevity of probable cause is most likely explained by the fact that while we can flirt with other ideas about preserving the right to be let alone and keeping a government from becoming a tyrant, probable cause keeps stepping forward to remind us that it really can work to give us a balance of freedom and security a well-ordered society should covet. The force of reason, rational consensus, and our need to espouse public reason all operate to bring us back to probable cause with the same relentless force which gravity exerts to bring objects back to earth. This primal phenomenon has been recognized in other constitutional contexts.

While it is unclear whether Justice John Harlan ever had the opportunity to read John Rawls, Harlan's insight about this matter as reflected in his dissent in *Poe v. Ullman*,<sup>135</sup> indicates that he and Rawls were reading from a common source.

Harlan dissented in *Poe* from the Court's refusal to consider on the merits a law that threatened a married couple with criminal prosecution for the use of contraception.<sup>136</sup> Harlan would have not dismissed the case on procedural grounds and would have declared the statute unconstitutional. While it is interesting for our purposes that at two points in his opinion he specifically refers to the freedom from unreasonable searches and seizures as a textual justification for protecting the activity of the couple in the sanctity of their home,<sup>137</sup> he does not ground his constitutional analysis of due process merely in implications from the text of the Constitution. Rather, he sees it more broadly:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course this Court's decisions it has

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135. 367 U.S. 496 (1961).

136. *Poe*, 367 U.S. at 523.

137. *Id.* at 543, 548. Indeed, he quotes Justice Brandeis' dissent in *Olmstead* in this regard. *Id.* at 548.

represented the balance which our nation, built upon postulates of respect for liberty of the individual, has struck between that liberty and the demands of organized society. The supplying content to this constitutional concept has the necessity of a rational process, but certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it develops as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could service as a substitute, in this area, for judgment and restraint.<sup>138</sup>

When he speaks of due process being “the balance which our nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and demands of an organized society,” he seems to be speaking of Rawls’ original process of consensus struck behind the veil of ignorance. When he speaks of that tradition being a “living thing” he must in some sense be speaking about the same principles that Rawls speaks of in the concept of reflective equilibrium or, more broadly, public reason. And when he says that a decision that “radically departs” from that living tradition cannot long survive, his words sound of the corrective force of reflective equilibrium in maintaining a well ordered society that understands the core principles which its people have negotiated and continue to negotiate as central to their perception of a proper moral existence.

My colleague, Professor Bruce Ledewitz, has written an insightful and provocative piece on Harlan’s opinion entitled *Justice Harlan’s Law and Democracy*.<sup>139</sup> Professor Ledewitz observes that when Harlan speaks of a decision that could not long survive, he is speaking of a process that is more than merely a dialog between the Court and the people; rather, “it is the

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138. *Id.* at 542.

139. Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 9 J.L. & POL. 373 (2004).

people, and not the court, that control.”<sup>140</sup> The tradition that is a living thing according to Harlan is, as Ledewitz argues, “the constitutional vision of the people.”<sup>141</sup>

The process by which the erroneous judicial decisions will ultimately be discarded does not come, however, as something achieved at the ballot box. “A judicial decision outside the main stream of American understanding of the Constitution will be worn away over time. There need be no single moment, like an election, in which one could plausibly say the people have spoken. There need be no special popular mobilization.”<sup>142</sup> The process is “cultural” and “organic” but it is greater than these; Professor Ledewitz argues that, at root, Harlan “is making a claim about governance.”<sup>143</sup> “When the nation – the people – set the balance of due process or decide concerning any other constitutional realm, the people have the right to rule. We have only one word that adequately describes rule by the people. That word is democracy. Justice Harlan is describing our democracy.”<sup>144</sup>

In this conception, democracy is like gravity, an irresistible force pulling errant legal decisions down to the earth where the people want them. That gravity certainly does not work the same in all political societies; in order for democratic forces to perform this magical, corrective function, democratic institutions must be in place. Federalism, separation of powers, the specification of human rights in fundamental documents, their enforcement by courts not controlled solely by majoritarian forces, indeed, the presence of anti-power,<sup>145</sup> are all necessary prerequisites for these gravitational forces to function effectively.<sup>146</sup>

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140. Ledewitz, *supra* note 143, at 329.

141. *Id.*

142. *Id.* at 398.

143. *Id.* at 395.

144. *Id.*

145. Pettit tells us:

The protection of the individual is mainly ensured in our society by the institutions of a non-threatening defense system and nonvoluntaristic rule of law. The nonvoluntaristic regimen of law – a common law dispensation or a

Harlan is indeed describing something in terms very comfortable to the political philosophy of Rawls. But is it “democracy” in the ordinary sense of that word, the passing majority view, or is it more the deeper consensus on the values of justice Rawls believes we ultimately espouse in public reason? Rawls spoke to this in his discussion of the role of the Supreme Court in *Political Liberalism*.<sup>147</sup>

For Rawls, when the people exercise their power to establish a new government, they set up a “higher law,” one that has the direct authority “of the will of We the People,” a law that “binds and guides” the ordinary power their government exercises in everyday law-making.<sup>148</sup> A democratic constitution is “a principled expression in higher law of the political ideal of the people to govern itself in a certain way” and the “aim of public reason is to articulate this ideal.”<sup>149</sup>

The Supreme Court’s role in this process is profound. It must “give due and continuing effect to public reason by serving as its institutional exemplar.”<sup>150</sup> Indeed, “public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone.”<sup>151</sup> In doing so, however, it does not assume the

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Constitutionally governed one – will involve law that cannot be changed in certain respects at the will of any majority, even a parliamentary majority; in this way it will serve to reduce the exposure of minorities to majority will[0].

Pettit, *supra* note 35, at 590.

146. In this regard, we must recall that our institutions are set up as much to restrain majorities when they seek, in the passions of the moment, to change the fundamental principles that make up our national consensus as they are to recognize them as the operating principle in the normal, law-making process. JAMES MADISON, FEDERALIST NO. 10, 460, 463 (Isaac Kramnick, ed., Penguin 1995).

147. JOHN RAWLS, POLITICAL LIBERALISM: *The Supreme Court as Exemplar of Public Reason*, 231-40 (Columbia University Press 1993).

148. RAWLS, *supra* note 151, at 231.

149. *Id.* at 232.

150. *Id.* at 235.

151. *Id.* at 235.

role as the ultimate power in the society. That ultimate power “is held by the three branches in a duly specified relation with each responsible to the people.”<sup>152</sup>

But this hardly makes the Court the handmaiden of the vagaries of the ordinary democratic processes. The Court plays a vital role “as one of the institutional devices to protect the higher law,”<sup>153</sup> mostly, as it turns out, by checking those skilled in manipulating the ordinary processes of law-making in ways to threaten the vitality of that higher law. In doing this, the Court is, in fact, serving the higher law, and highest goals, the rational process of societal consensus has sought to achieve:

By applying public reason the court is to prevent [the higher law] from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it is incorrect to say that it is straight-forwardly antidemocratic. It is indeed antimajoritarian with respect to ordinary law, for a court with judicial review can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations.<sup>154</sup>

Justices serve best when they appeal “to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason . . . [values] that all citizens as reasonable and rational might reasonably be expected to endorse.”<sup>155</sup> They must not succumb to the exigencies of the moment, no matter how widespread the call may be to disregard that higher law in a time of crisis. The court must act as a conscience, reminding a troubled majority of the values they established at a time when reason

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152. *Id.* at 232.

153. RAWLS, *supra* note 151, at 233.

154. RAWLS, *supra* note 151, at 233-34.

155. *Id.* at 236.

and a fundamentally moral process produced a consensus on values that were meant to endure. If they do not, over time, public reason will correct them.

Indeed, Professor Ledewitz argues that the democratic process Harlan describes is corrective only. Judges need to rely upon rationality and restraint, and hope that the democratic forces confirm their judgment over time.<sup>156</sup> Rawls observes that:

The constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is. A particular understanding of the constitution may be mandated to the Court by amendments, or by a wide and continuing political majority, as it was in the case of the New Deal.<sup>157</sup>

Hopefully, though, judges can at least be aware that these forces exist and, more vitally, the rational process of negotiation which influences them. Through contemplation of the process of “original position,” judges may find their decisions will weather the test of time. Through this process, they may sense the core, and feel the heart, of the conception of justice probable cause serves and protects. The court can come home to reason by seeing what probable cause would mean when viewed through the rational process of the original position and the common good that process seeks to bring about.

At the root of this process, as Harlan tells us, is not so much “a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the right from unreasonable searches and seizures; and so on.”<sup>158</sup> Rather, the freedom which is at the core of the Constitution and which is profoundly expressed in the yearning for a probable cause standard that meaningfully limits the ability of government to intrude upon our privacy, is part of “a rational continuum which, broadly speaking, includes a

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156. Ledewitz, *supra* note 143, at 410.

157. Rawls, *supra* note 111, at 237-38.

158. *Poe*, 367 U.S. at 543.

freedom from all substantial arbitrary impositions and purposeless restraints. . . . And which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny asserted to justify their abridgement.”<sup>159</sup>

The insight judges must have is not one they will obtain by sitting as philosopher kings or by divining natural law etched in stone tablets. What should control is simply the voice of a rational people who have deftly negotiated with each other with an eye to the common good, who have properly accounted for the needs of all who are in the probable cause equation, and who are cognizant that the most serious tests of that equation will be when the pressures of the moment seem most dire. Judges need not seek to be the ablest and purest of men, but simply to understand that the core of justice the process of probable cause addresses is the product of a reasoned people thinking, judging, negotiating, and ruling when they were as pure and as able as democratic peoples can be.

Richard Hooker told us over four hundred years ago that “[t]here are but two ways whereby the spirit leadeth men into all truth: the one extraordinary, the other common; the one belonging but unto some few, the other extending itself unto all that are of God; the one that which we call by a special divine excellency *Revelation*, the other *Reason*.”<sup>160</sup> Not all of us will be blessed with revelation, but all of us have an old friend in probable cause, a friend we have always located when we have taken the path of reason in the search for truth. In the end, that should be a comforting thought in a nervous age.

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159. *Id.*

160. RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY*, 16 (Arthur Stephen McGrade, ed., Cambridge University Press 2004).